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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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Sophia Wilansky,) File No. 18-CV-316
Petitioner,) (WMW/TNL)
vs.)
United States of America; Gary) St. Paul, Minnesota
Lee Delorme, in his official) May 29, 2018
capacity as Assistant United) 10:04 a.m.
States Attorney for the District)
of North Dakota; Brian James)
Vanoosbree, in his official)
capacity as Special Agent of the)
Federal Bureau of Investigation;)
and Christian Gregory Freichels,)
in his official capacity as)
Special Agent of the Federal)
Bureau of Investigation,)
)
Respondents,)
)
and)
Morton County, North Dakota)
)
Intervenor.)
)

BEFORE THE HONORABLE WILHELMINA M. WRIGHT
UNITED STATES DISTRICT COURT JUDGE

(MOTIONS HEARING)

Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 APPEARANCES

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PROCEEDINGS

IN OPEN COURT

LAW CLERK: Your Honor, the matter on the case [sic] is 18-CV-0316, Sophia Wilansky vs. United States of America, et al., here on a motion to dismiss.

6 THE COURT: Thank you. Counsel, please note your
7 appearances.

8 MR. STOLL: Benjamin Stoll from Williams &
9 Connolly for Petitioner Sophia Wilansky.

10 THE COURT: Thank you.

11 MR. PELIKAN: Matthew Pelikan from Madel, PA for
12 Sophia Wilansky.

13 THE COURT: Thank you.

14 MR. BAUNE: Craig Baune, Assistant United States
15 Attorney, on behalf of the respondents.

16 THE COURT: Thank you, Counsel.

17 MR. BAKKE: Randall Bakke on behalf of Intervenor
18 Morton County from Bakke, Grinolds, Wiederholt law firm in
19 Bismarck, North Dakota.

20 THE COURT: Thank you. Counsel, are we ready to
21 proceed? And I also will ask about how you will be arguing
22 this morning since there are four counsel.

23 MR. STOLL: Sure, Your Honor. We talked about
24 this earlier and I think we've reached an agreement.
25 Petitioner will start and will give the opening argument

1 Then the federal government and respondents will give their
2 argument. Then Morton County. And then we can have a
3 reply, as you would see fit, from the petitioner and then
4 also a second reply, if you see fit, from the federal
5 government.

6 THE COURT: Very well. Thank you, Counsel. You
7 may proceed.

8 MR. STOLL: Thank you, Your Honor. We are here
9 today on a Rule 41(g) motion filed by Sophia Wilansky.
10 Sophia seeks the return of shrapnel that was seized from her
11 body by the federal government and clothing that was seized
12 from her by the federal government.

13 I would note at the outset that it seems like the
14 biggest contention here is over the shrapnel, so I am
15 largely going to argue here about the shrapnel, but my
16 arguments here apply with equal force to the clothing and we
17 can discuss that separately if you would like to do so.

18 THE COURT: Okay.

19 MR. STOLL: On a Rule 41(g) motion I think the key
20 issue is reasonableness. And the Court is being asked here
21 to balance the reasonableness of how long the government has
22 had Sophia's possessions, in particular the shrapnel,
23 against the need that she has to get those items back.

24 And what I would submit to you is that the
25 government has now had the shrapnel for more than a

1 reasonable amount of time and you can see that in the fact
2 that similar cases have held that holding items for 17, 18
3 months, similar to what we see here, if not less, is plenty
4 of time for the government and at that point the government
5 is asked to return those possessions to the petitioner in
6 these type of motions.

7 The government has essentially argued that it has
8 an ongoing criminal investigation here and that's why it
9 needs to keep the shrapnel, but I think the language in the
10 *Black Hills* case from the Eighth Circuit is instructive
11 because that was a case that also involved a situation where
12 the government was claiming an ongoing investigation and
13 what the Eighth Circuit said there is that the government
14 may retain seized goods for a reasonable time while the
15 investigation and prosecution proceed.

16 So the Eighth Circuit there was sort of
17 acknowledging the fact that even in a situation of a
18 proclaimed ongoing investigation, the government is only
19 allowed to hold a private citizen's property for a
20 reasonable amount of time. And here the government has held
21 it for more than a year before Sophia filed this motion and
22 we're now at the point where it's been about 18 months.

23 You know, Sophia is at a bit of disadvantage here
24 because I can't see what the government wrote in its
25 *ex parte* brief to you where it provided its explanation of

1 why this investigation is still going, but there are public
2 indicia of the fact that this investigation has been going
3 on too long at this point.

4 It's not a complicated case. There were numerous
5 law enforcement eyewitnesses. The government secured the
6 relevant evidence within days of Sophia's injury. They
7 began testing that evidence within days of Sophia's injury,
8 and they have now admitted and conceded that they are done
9 testing the evidence. So it seems that the only reasonable
10 thing to do here is to return that evidence to the
11 petitioner.

12 On the other side of the ledger, I think Sophia's
13 need for the shrapnel and the clothing is extremely high
14 here. Number one, she continues to suffer an extreme
15 reputational detriment from the fact that various government
16 agents have insinuated that she participated in making
17 explosive devices for use against law enforcement, something
18 that the media has picked up on and published national
19 stories about. So she has this horrible reputational cloud
20 hanging over her head.

21 THE COURT: And how does the shrapnel relate to
22 that, the possession of the shrapnel relate to that?

23 MR. STOLL: She needs the shrapnel to test it to
24 establish that it didn't come from the type of propane
25 device that the government is asserting she was attempting

1 to make.

2 So the other sort of need that she has for this
3 evidence --

4 THE COURT: What about the clothing? Is it the
5 shrapnel -- I mean, you've focused on the shrapnel. The
6 same arguments, do they pertain to the clothing and are you
7 using them as synonymous?

8 MR. STOLL: Yes, I think the shrapnel is likely to
9 be more probative on these matters, but her clothing may
10 have residues on it and the way that the clothing was
11 destroyed could be indicative of the type of item that
12 caused her injury.

13 So just as an example, if you had an explosion
14 that produced a lot of heat, you would expect charring of
15 the coat and sort of evidence of fire damage. So looking at
16 her clothing and seeing whether that existed would be
17 probative of how she was injured.

18 THE COURT: And does she seek possession or
19 inspection?

20 MR. STOLL: You know, I think in the first
21 instance she would seek possession, but she --

22 THE COURT: Why?

23 MR. STOLL: There's a good reason for that, Your
24 Honor, and that is having never gotten a chance to see these
25 items yet, it is a little hard at this stage for us to

1 anticipate sort of how many times we're going to need to
2 analyze it, what kind of analysis we're going to need to
3 perform and so --

4 THE COURT: So why wouldn't that require or bode
5 for an inspection so that you can better refine your
6 arguments and make them persuasively?

7 MR. STOLL: In the first instance we would be very
8 happy if Your Honor ordered the government to allow Sophia's
9 expert to inspect the items. In fact, if the order was
10 written such that Sophia's expert had reasonable access to
11 the item, I think we would be fine with it remaining in the
12 government's possession.

13 I will say that the *Black Hills* case sort of
14 addresses the question of when the government wants items as
15 evidence, what to do about a petitioner who would like the
16 items returned and they talk about an example where the
17 government seizes a getaway car and the owner of that car
18 wants that car returned.

19 What the *Black Hills* court says in that case is
20 that the government is only allowed to hold the car for a
21 reasonable amount of time. After that point the government
22 can lift fingerprints from the car, dust the car for other
23 evidence, they can take pictures of the car. They can do
24 what it needs to do to gather the evidence it needs, but
25 then it needs to return the car.

1 And I think that's instructive here because that's
2 a situation in which the criminal defendants, the supposed
3 bank robbers, would clearly want to test the car themselves
4 to try to show that the government, you know, didn't lift
5 the prints correctly and whatnot. But the court doesn't say
6 that. The court doesn't say the government is allowed to
7 keep the car. The court says the government has to take its
8 evidence from the car, preserve that evidence, and give the
9 car back.

10 THE COURT: And so the analogous evidence in this
11 case would be what?

12 MR. STOLL: Would be the shrapnel. So the
13 government has conceded that it's already completed its
14 testing of the shrapnel. If there are residues on the
15 shrapnel, presumably they've tested those residues to see
16 what they're made out of. They've tested the chemical
17 composition of the shrapnel. I mean, I'm not 100 percent
18 sure of exactly what tests the government has conducted, but
19 presumably they have all those lab results and they can keep
20 those lab results and those lab results are what they would
21 eventually use, presumably, as evidence in a trial.

22 I mean, the shrapnel at issue here is a
23 one-millimeter square piece of metal. It's not the kind of
24 thing that's a terribly compelling piece of sort of physical
25 evidence in its own right. What's relevant is the tests

1 that are conducted on it.

2 THE COURT: Really?

3 MR. STOLL: Well --

4 THE COURT: I mean, I've sat through enough trials
5 to know that having someone talk about an object versus
6 having the object before you has a different impact upon the
7 fact-finder in a given case. So I'm intrigued by that
8 argument.

9 MR. STOLL: Understood, Your Honor.

10 THE COURT: I certainly understand the need to
11 preserve evidence, but I'm curious about your argument.

12 MR. STOLL: Sure. I would make two points about
13 that, Your Honor. The first is that in our briefing we've
14 already acknowledged that if the government really needs the
15 actual piece of shrapnel for a trial, we are more than happy
16 to voluntarily make that piece of shrapnel available to them
17 for the trial. So, I mean, we will give it back to the
18 government on a limited basis if the government needs it for
19 a reason.

20 And so I think, you know, even if you think that
21 the shrapnel is a compelling piece of evidence in its own
22 right, the government doesn't have -- we don't have a
23 problem supplying it to the government.

24 THE COURT: Okay.

25 MR. STOLL: Would you like me to go through any of

1 the jurisdictional factors, Your Honor, or are you happy
2 with the briefing on that?

3 THE COURT: I am going to let you present your
4 argument as you see fit.

5 MR. STOLL: Okay, Your Honor. So in addition to
6 the sort of reasonableness analysis, which is, I think, the
7 heart of the Rule 41(g) inquiry, there are also these four
8 factors that the Eighth Circuit instructs the courts to look
9 at to determine whether exercise of jurisdiction is proper
10 here and those factors do, I think, significantly overlap
11 with the merits analysis, but those factors are whether
12 there was a disregard of the petitioner's constitutional
13 rights in the seizure, whether there was irreparable injury
14 to the petitioner, whether the petitioner had a possessory
15 interest in the shrapnel, and whether the petitioner has a
16 viable alternative remedy to a Rule 41(g) motion.

17 And I would say on the disregard of constitutional
18 rights prong, that's largely, I think, the same as the
19 reasonability analysis on the merits. For purposes of this
20 motion we're not disputing the original seizure of it. The
21 constitutional harm or the constitutional disregard here
22 comes from the fact that the government has since retained
23 the shrapnel now for an unreasonable period of time.

24 THE COURT: So if I understand your argument,
25 there's no contest as it relates to obtaining a grand jury

1 subpoena for the evidence?

2 MR. STOLL: Sorry, Your Honor. I didn't hear
3 that. Can you say it again?

4 THE COURT: No contest as to obtaining a grand
5 jury subpoena for the evidence, for the shrapnel?

6 MR. STOLL: For purposes of this motion we are not
7 disputing the propriety of the grand jury subpoena.

8 THE COURT: And so it's just the length of
9 retaining the evidence that you are contesting?

10 MR. STOLL: For purposes of this motion, correct,
11 Your Honor.

12 THE COURT: Okay.

13 MR. STOLL: On the irreparable harm prong, I think
14 I've largely covered the main points on that as well.
15 Sophia is suffering from a reputational ongoing harm as a
16 result of these sort of media stories and these accusations
17 by law enforcement. She needs to clear her name and she
18 needs the shrapnel to help her clear her name.

19 The other thing I would say is that Sophia has
20 amassed significant medical bills and other financial
21 obligations related to her injury and she would like to seek
22 financial redress of that.

23 THE COURT: How do we think about the statute of
24 limitations for the United States' case as it relates to the
25 appropriate length of time that one should maintain control

1 and custody over the property?

2 MR. STOLL: I would say, Your Honor, that the
3 statutes of limitations are generally made to be long enough
4 that the government should not have trouble in an ordinary
5 case, certainly a case like this, conducting its
6 investigation and bringing its indictments or closing its
7 investigation within the amount of time necessary to return
8 the property so that the petitioner can file her legal
9 actions before the statutes run.

10 So in this particular case, just as an example, a
11 defamation suit in Morton County would have a two-year
12 statute of limitations. If the government conducted a
13 year-long investigation, which I think is, frankly, a long
14 time for an investigation like this, completed its
15 investigation and returned the shrapnel, the petitioner
16 would have plenty of time, a year, to analyze the shrapnel
17 and use it as part of a defamation suit.

18 THE COURT: What about a criminal case, what would
19 the statute of limitations be for that?

20 MR. STOLL: In terms of something that the
21 government would bring?

22 THE COURT: Yes.

23 MR. STOLL: Against whom?

24 THE COURT: Against your client.

25 MR. STOLL: Well, again, I think that -- if the

1 government thinks that there was a private citizen who was
2 responsible for Sophia's injury, I think a year is plenty of
3 time in this particular situation for the government to
4 investigate that and to issue an indictment or arrest
5 somebody.

6 THE COURT: And so we don't look to the statute of
7 limitations as a governor at all?

8 MR. STOLL: Oh, in terms of the statute of
9 limitations on the government's side? I'm sorry.

10 THE COURT: Right.

11 MR. STOLL: I think it would be a relevant factor,
12 but in this kind of situation I don't think it's
13 dispositive.

14 THE COURT: I mean, they have more than one case
15 to bring theoretically and so I'm just trying to get a sense
16 of how we look at a statute of limitations and whether we
17 look at it at all as it relates to whether or not the
18 evidence that might be used in the course of a proceeding
19 has been held too long.

20 MR. STOLL: Understood, Your Honor. I'm not aware
21 of any case law where the courts have looked at the
22 government's statute of limitations as a factor in deciding
23 whether the investigation was reasonable. I do think that
24 in the appropriate circumstances that could be relevant. I
25 think that would be more relevant in a case where you had a

1 very complicated investigational process going on.

2 THE COURT: I'm going to stop you there just
3 because you say a year, well, is enough, but theoretically
4 the evidence may be needed for longer than a year and the
5 statute of limitations would permit a case to be brought for
6 longer than a year after the evidence was seized, correct?

7 MR. STOLL: That's correct, Your Honor, but what I
8 would say is what I think *Black Hills* instructs is that in a
9 situation where you have a long ongoing investigation, the
10 courts are asked to look at reasonable substitutes for the
11 government holding a private citizen's possessions for an
12 indefinite period of time and those substitutes are lab
13 results, photos, other sort of forensic evidence that are
14 gathered from the actual item rather than holding the item
15 itself.

16 And I think the case law across the circuits is
17 relatively consistent on the fact that once you start
18 approaching a year and a half, the courts start saying,
19 look, it's time to return the possessions, Government, you
20 need to use other substitutes.

21 THE COURT: What's the nature of those possessions
22 in that year-and-a-half range?

23 MR. STOLL: It is often cash or business
24 documents.

25 THE COURT: Which can be copied. So you would say

1 this is the equivalent of cash or business documents, which
2 can be photographed, and therefore you don't need to
3 maintain physical control over the shrapnel itself?

4 MR. STOLL: I think there are strong similarities
5 to that. I do think that there are sort of -- I would
6 concede that there are complexities to this particular type
7 of shrapnel that aren't there for a business record or cash,
8 but there are cases that address that as well.

9 So I think *Black Hills* is particularly instructive
10 on that because in that case you have these dinosaur bones,
11 which really are relevant as the actual bones themselves and
12 the various forensic evidence that can be lifted from them,
13 and what the court said about those bones after only a month
14 is the government needs to return them, but before the
15 government returns them they can take whatever steps are
16 necessary to establish proof of the evidence before they
17 return them.

18 So the government [sic] is acknowledging that, you
19 know, even in situations where the item that the petitioner
20 wants back is itself the critical piece of evidence, there
21 are alternatives to just letting the government hold that
22 item indefinitely. I think the example of the getaway car
23 is another way that the *Black Hills* court is trying to
24 discuss that issue.

25 THE COURT: And here there was a grand jury

1 subpoena, correct?

2 MR. STOLL: There was a grand -- my understanding
3 is that there was a grand jury subpoena issued to the
4 hospital for the shrapnel.

5 THE COURT: Okay. And so that means that the
6 grand jury is conducting an investigation. How do we get
7 insight -- given the secret nature of the grand jury, how do
8 we get insight that protects that investigative interest?

9 MR. STOLL: Sure. Well, certainly, Your Honor, I
10 believe that the government has supplied some of that
11 insight to you in its *ex parte* briefing. I can't refute
12 that because I can't see it, but that is one way for you to
13 get that information.

14 I would also say that to some extent once the
15 government has had the item for well over a year, those
16 compelling circumstances regarding its investigation are
17 relevant, but they're not dispositive anymore. After a
18 year, after 18 months the courts are instructed to tell the
19 government it has to use a substitute rather than keep the
20 actual item.

21 And lastly on that point I would say I've already
22 acknowledged that we are willing to talk about compromises
23 that allow the government to keep possession of the shrapnel
24 as long as Sophia's expert is allowed to analyze it.

25 THE COURT: And if I were to look to an analysis

1 that requires callous disregard, what would you point to in
2 that regard as evidence or the best evidence of that?

3 MR. STOLL: Sure. I mean, I think that the *Black*
4 *Hills* case and the *Mr. Lucky* case are the best, sort of most
5 relevant case law on that point because they're both
6 situations in which the government had a proclaimed ongoing
7 investigation at the time that the petitioner sought the
8 return of the items and there you will see that in both
9 cases the way that the court analyzed the question of
10 callous disregard was to look at the reasonableness of the
11 length of time that the government has held the possession
12 in conjunction with the reasons the government has given for
13 why it still needs -- for why its investigation is taking so
14 long and why it still needs the evidence and what the viable
15 substitutes are.

16 And the *Mr. Lucky* case says, I think pretty
17 straightforwardly, that in a situation in which the
18 government holds private property for an unreasonable period
19 of time, you have callous disregard right there. Even if
20 the initial seizure was proper, even if the government has
21 an ongoing investigation, there needs to be some diligence.

22 And I think a lot of that dates back to the
23 *Sovereign News* case where the court noted that the
24 government is not allowed to just hold private property in
25 the hopes that someday that property will become relevant to

1 some indictment it wants to bring.

2 There has to be some onus on the government here
3 to move with some diligent speed and to finish its
4 investigation in a reasonable amount of time. Otherwise the
5 government has to rely on substitutes, like lab results,
6 pictures, things like that.

7 The last point -- well, on the last two prongs
8 that we haven't really discussed, Your Honor, the first
9 being an alternative remedy, I think it's pretty clear here
10 that Sophia does not have a viable alternative remedy.

11 What the courts seem to talk about in those
12 situations are whether there's a criminal proceeding where
13 the petitioner can file a motion for the return of its
14 property as part of an ongoing criminal proceeding against
15 it or a situation in which the government has filed a
16 forfeiture action and so the petitioner can use that
17 forfeiture action as a vehicle for disputing the
18 government's seizure of its property.

19 This is a situation in which the government has
20 brought no actions, certainly not against my client, and so
21 Sophia has no ability, no other avenue for disputing the
22 government's retention of her property.

23 The government's argument is that her alternative
24 is just to wait until the government decides it wants to
25 voluntarily comply with her request to return it and I don't

1 think that that is -- I don't think that's really a remedy
2 at all, but I certainly don't think it's a reasonable
3 alternative; and if it were --

4 THE COURT: Why isn't, again, the statute of
5 limitations on any claims by the government a reasonable
6 governor? Is it because there's the competing statute of
7 limitations that your client is concerned about?

8 MR. STOLL: Yes. And in other situations there's
9 also just the fact that private citizens are entitled to
10 have their private property back. They're entitled to not
11 have the government just hold their property for
12 unreasonable lengths of time because the government, you
13 know, thinks it might be relevant to something in the
14 future.

15 THE COURT: And at what point did the shrapnel
16 become the property interest of your client versus the
17 United States?

18 MR. STOLL: Sure. I don't think the United States
19 has ever had a property -- a possessory interest in the
20 shrapnel. I think it's only wanted it for evidence. I
21 think it became the property of Sophia when it was embedded
22 in her arm. At that point I think it's a reasonable --

23 THE COURT: So I'm going to go back to, okay, so
24 where do we get fee title in that instance?

25 MR. STOLL: My understanding is that black-letter

1 property law certainly in Minnesota and I think throughout
2 the country is that the first known possessor of a piece of
3 property is presumed to be the owner of that property as to
4 everybody else who subsequently possesses it and everybody
5 else who claims an interest in it, other than those who can
6 come forward with better title. I mean, I think that's just
7 how property interests sort of come into existence initially
8 when you have --

9 THE COURT: So the property interest develops at
10 the point when it's lodged in a party's body?

11 MR. STOLL: Yeah. At that point I think she's
12 analogous to somebody who found property. Right? And as a
13 finder, she becomes the owner of that property unless
14 somebody else comes forward and establishes that they owned
15 the property first before it was embedded in her.

16 This is sort of a unique situation because both
17 Morton County and the federal government are trying to
18 undermine Sophia's property interest in this piece of
19 shrapnel, but neither one of them are willing to claim that
20 it's their property. In fact, both of them have claimed
21 that it's not. If they want to claim that it's their
22 property, that it came from their munition, I think we would
23 have a very different conversation about this.

24 And that's actually a good segue into -- well, let
25 me make one other point about Sophia's possessory interest

1 in the shrapnel. I would say that the government has
2 already acknowledged, essentially, that Sophia does have a
3 possessory interest in the shrapnel and you can see that
4 from Sophia's father Wayne's conversations with Agent Hoff
5 and Agent Delorme -- sorry, Mr. Delorme over time.

6 And the government talks a lot about the sort of
7 notes that were scribbled on the consent to search form, but
8 what's really the point of all that from Sophia's
9 perspective is that at the time the government came to take
10 Sophia's property, Wayne stood up and he said, you know, we
11 are willing to voluntarily part with this property to aid in
12 the government's investigation as long as the government
13 agrees that it is -- that we do have a possessory interest
14 in this property and that we are entitled to have it back
15 for testing in a reasonable time frame. And that's the
16 conversation he had with Agent Hoff, which he included in
17 his declaration. The government in its briefing, as far as
18 I can tell, has not refuted that that is the conversation he
19 had with Agent Hoff.

20 And then every month he called Agent -- or
21 Mr. Delorme to say when are we getting the shrapnel back and
22 during those conversations Mr. Delorme acknowledged that
23 that shrapnel was covered by the general agreement with
24 Agent Hoff that the shrapnel was Sophia's, that she was
25 entitled to have access to it in a timely manner. He just

1 refused to sort of actually abide by the agreement he
2 acknowledged existed. I don't think that the written
3 consent form is terribly important in its --

4 THE COURT: Why? Why isn't it important?

5 MR. STOLL: It was not, I think, intended to be a
6 contract. It's not an integrated agreement where it's the
7 entire understanding between the parties.

8 THE COURT: It's consent. Is the consent limited?

9 MR. STOLL: I think --

10 THE COURT: More time limited, that's what I mean.

11 MR. STOLL: Sorry. Is what time limited?

12 THE COURT: Is the consent time limited?

13 MR. STOLL: Yeah. I would say that the
14 understanding was that the consent to the government having
15 the shrapnel and the clothing was limited by the government
16 finishing with it in a reasonable time frame or at least
17 make it accessible to Sophia in a reasonable time frame.

18 THE COURT: So "finished with it" would make me
19 think that we're looking at a statute of limitations.

20 MR. STOLL: I don't think that Wayne or Agent Hoff
21 were thinking in that level of detail at the time that they
22 were sort of reaching this oral agreement.

23 I mean, Wayne was under extraordinary distress
24 here. His daughter was being prepped for surgery and he had
25 a whole team of FBI agents sort of outside her hospital room

1 that was making it difficult for medical personnel to get
2 her into surgery. He needed to do something very quickly
3 and so he said, you know, I'm willing to be reasonable, I'm
4 willing to help in this government investigation, but I want
5 some assurances that I'm not giving away my rights to this
6 property on behalf of my daughter. And I think that the
7 government hasn't followed through on the principle behind
8 that agreement.

9 But I think the -- Sophia's right to the clothing
10 and the shrapnel in terms of it being her property would
11 exist even if there had been no agreement with the
12 government.

13 So even if the government had come in and had
14 taken all that stuff pursuant to a search warrant and a
15 grand jury subpoena and had never talked to Wayne about it,
16 I think we would still be here today and I would still be
17 making this exact same argument, that the government has had
18 these items for too long, that they --

19 THE COURT: Too long being how long?

20 MR. STOLL: Certainly 18 months. I think, you
21 know, the cases that I have seen on this, the longest that I
22 have seen is about 18 months.

23 So we filed -- patiently waited a year
24 specifically to give the government a full year to conduct
25 its investigation and then we filed this suit with an

1 understanding that it would take some time to brief it and
2 to have an oral argument and for Your Honor to reach a
3 decision about it and that would get us to the point where
4 we are at 18, 20, you know, months and at that point we
5 really -- we're up against a wall because we have a two-year
6 statute of limitations on a defamation case. So, you know,
7 Sophia waited, I think, as long as she reasonably could
8 before bringing this action.

9 THE COURT: So the statute of limitations that I
10 should focus on for how long is too long is the defamation,
11 not any other statute of limitations, from your client's
12 perspective?

13 MR. STOLL: It's the most important, Your Honor,
14 because it's the shortest, but there are others. I believe
15 that certain common law tort actions in North Dakota would
16 have a three-year statute of limitations.

17 THE COURT: And help me just understand with
18 precision the relationship between this evidence and a
19 defamation claim.

20 MR. STOLL: Sure. So in a defamation case that
21 Sophia would bring against, you know, the people who are
22 defaming her, part of establishing that defamation action
23 would be establishing that the accusations against her are
24 false. The shrapnel would be highly probative of that.

25 THE COURT: Probative of?

1 MR. STOLL: The falsity of the accusations.

2 So Sophia gets injured. Law enforcement agents
3 come forward and insinuate or state that she was injured by
4 a propane tank explosion. That propane tank was being built
5 by protesters, potentially including Sophia herself. And so
6 therefore this gruesome injury is the fault of protesters
7 who are essentially creating bombs to use against law
8 enforcement.

9 If the shrapnel comes back and it's made of the
10 same material as, for example, a flash-bang or a CS grenade
11 and the composition of the shrapnel is not consistent with a
12 propane tank, I think that goes a long way to establishing
13 that the accusation made by law enforcement is objectively
14 false.

15 THE COURT: Was she in possession or control of
16 the propane tank?

17 MR. STOLL: I'm not sure that there were any
18 propane tanks, Your Honor. Sophia certainly didn't have any
19 and was not participating in any use of propane tanks.
20 There were a lot of propane tanks around the area because
21 this was the middle of winter and propane tanks were a
22 primary source of heat for the protesters.

23 THE COURT: And the shrapnel, you think, came from
24 that? I'm just trying to track your argument.

25 MR. STOLL: We are trying to figure out where the

1 shrapnel came from.

2 THE COURT: Okay.

3 MR. STOLL: That's why we would like to have it
4 back. My best understanding at this point is that the
5 shrapnel came from some type of less lethal munition that
6 was being used by law enforcement in the area around the
7 time of Sophia's injury. I'm not exactly sure what
8 particular munition it was, but that's why we have hired a
9 forensic chemist who has a lot of experience dealing with
10 less lethal munitions and artifacts from explosions and has,
11 you know, worked closely with law enforcement.

12 She's in a position to look at this and to say,
13 you know, this could have come from a flash-bang, this could
14 have come from a tear gas grenade, something like that. She
15 would also be in a position to say whether or not it came
16 from a propane tank.

17 THE COURT: And why couldn't she plead her case
18 without the shrapnel?

19 MR. STOLL: She could file suit without the
20 shrapnel, but as I think we mentioned in our brief, I mean,
21 I think it's inevitable that the government is going to
22 claim qualified immunity and put up the same hurdles that
23 you're seeing today to letting Sophia have access to and
24 test the property that's in the government's possession.

25 So what we're trying to do is we're trying to get

1 all the evidence we can get before we file a suit. Before
2 we make public legal accusations against the government
3 about something, we want to have all the available evidence
4 to do that.

5 If our motion was denied here and Sophia was
6 denied even access to testing the shrapnel, what's going to
7 happen is, you know, in the next couple of months some kind
8 of civil lawsuit is going to get filed and we're going to be
9 right back here having the same argument but under sort of
10 discovery rules rather than under Rule 41(g). That seems
11 inefficient. I mean, in a world in which it came back and
12 the shrapnel was definitively not --

13 THE COURT: There would be something to tether it
14 to and so while you may think it's inefficient because it
15 takes longer or requires more legal resources, at least
16 there is a claim to tether it to. There is a doctrine about
17 discovery that would be a means to tether the analysis to.
18 There would be less speculation about the relevance of this
19 evidence and the need for discovery for it.

20 MR. STOLL: Your Honor, I would say that I think
21 there is both a clear tether and a clear doctrine here. I
22 mean, I think Rule 41(g) is a very clear doctrine about how
23 courts look at these situations and the tether here is that
24 the items are Sophia's property.

25 She's a private individual. She is entitled to

1 the return of her private property. And I think that she's
2 entitled to that even if she's not intending to file any
3 lawsuits against anybody, even if there wasn't any question
4 of, you know, whether this is going to end up being
5 probative of a 1983 action or not.

6 There's a real significant value here in her just
7 having the shrapnel so that she can test it so that she can
8 find out and get definitive proof for herself and for the
9 public of what caused her injury.

10 I mean, she's operating under both some lack of
11 knowledge herself of how she was injured and who was
12 responsible for that and what type of munition injured her,
13 and she's also under this reputational cloud that she needs
14 the shrapnel to clear up. I think those establish her
15 irreparable harm, which is a prong to the jurisdictional
16 inquiry.

17 But the question of on the merits whether she gets
18 the property back or whether she gets access to it doesn't
19 require her to show that she needs it for some legal
20 purpose. It just requires her to show that it is her
21 property and the government has had it for too long, and I
22 submit to you that both of those two things are true here.

23 Thank you, Your Honor.

24 THE COURT: Thank you, Counsel.

25 MR. BAUNE: May it please the Court.

1 The plaintiff seeks to require the government to
2 hand over evidence to her that's central to an ongoing
3 criminal investigation for her use in preparation for a
4 civil case that she has not yet brought.

5 Under those circumstances the Court should deny
6 her motion for return of property and dismiss this case for
7 lack of equitable jurisdiction because she cannot make the
8 extraordinary showing required for the Court to exercise
9 such equitable or, as it's sometimes called, anomalous
10 jurisdiction.

11 THE COURT: So ongoing civil investigation --

12 MR. BAUNE: I apologize. If I said civil, I
13 meant --

14 THE COURT: I'm sorry. Criminal. You did say
15 criminal. Ongoing criminal investigation. So I am looking
16 at a six-year statute of limitations for that?

17 MR. BAUNE: That is my understanding. I don't
18 believe I can say with precision what potential charges
19 there are without violating grand jury disclosure, but I
20 believe we are looking at a five- or six-year statute of
21 limitations.

22 THE COURT: Okay. And the civil statute of
23 limitations?

24 MR. BAUNE: The civil statute of limitations is
25 unclear because the moving documents -- the petition and the

1 briefing says that they may potentially have civil claims
2 with a two-year statute of limitations, but until today they
3 haven't said what those statutes of limitations are.

4 THE COURT: And sometimes you need to do your
5 investigation before you file your lawsuit and plead your
6 claims in a complaint. Certainly judges appreciate that
7 level of pre-complaint discovery and investigation. And I
8 hear plaintiff saying that that's really -- that the
9 position that the United States is taking is getting in the
10 way of it being able to plead with precision and in a timely
11 fashion.

12 MR. BAUNE: Well, plaintiffs have to date not been
13 shy about saying either in pleadings and in the public what
14 they think happened. They've made a pretty clear argument
15 that they believe that law enforcement fired less lethal
16 ammunition at her and that that caused an explosion and that
17 caused the shrapnel to be lodged in her arm. That's
18 essentially what they pled in this case. So I don't know
19 why they would need to wait for further investigation to
20 plead it in another case.

21 And more to the point, though, first of all, they
22 do have -- even if a two-year statute of limitations
23 applied, they still have six months between now and then
24 and this investigation, although it hasn't been charged yet,
25 I mean, there could be a conclusion to the investigation in

1 the interim where either charges are filed or where the
2 investigation closes. At that point either criminal
3 discovery would kick in or the government would no longer
4 have a reason to hold the property. But beyond that --

5 THE COURT: And you can waive that statute of
6 limitations?

7 MR. BAUNE: I'm sorry?

8 THE COURT: You could waive that statute of
9 limitations?

10 MR. BAUNE: I don't know that the government could
11 waive that statue --

12 THE COURT: So they are supposed to just hope and
13 pray that the government acts in a timely fashion that
14 facilitates their lawsuit such that they can file it within
15 the statute of limitations?

16 MR. BAUNE: Well, there's, I guess, a two-part
17 answer to that. One is there is time left. Irreparable
18 harm is not the notion that they have just -- that they may
19 suffer irreparable harm at some point. I think they need to
20 be closer to their statute of limitations before they have
21 hit irreparable harm and that's only if you assume that they
22 need to have the property in order to file their civil case.

23 But the bigger problem for them than that is that
24 civil cases are filed all the time without parties having
25 access to all the evidence in advance. It would be -- I am

1 sure it would be helpful for them to have that, but it is
2 not required to have all the evidence before you file a
3 civil case. That's what civil discovery is for.

4 THE COURT: So the government's position is that
5 it would waive all of these arguments in the course of civil
6 discovery?

7 MR. BAUNE: That is not my position. I don't know
8 for sure that the federal government would be a defendant,
9 so I don't know that I can make a claim as to what would be
10 waived.

11 I think we would be talking about 1983 claims,
12 defamation claims to the extent that they're against
13 primarily, if not exclusively, state and local actors. And
14 if there were a claim against federal actors, it would have
15 to be a *Bivens* claim. It wouldn't be a claim against the
16 federal government itself.

17 I can't at this point -- a *Bivens* claim is an
18 individual capacity claim against those individuals who are
19 involved. So at this point I'm not representing any of
20 those individuals. There's been no suit. There's been no
21 finding. So I can't say what would be waived or not waived
22 by the federal government or federal defendants in such a
23 case.

24 But if such a claim were filed within two years,
25 again, a motion to dismiss, whether it be *Bivens* or whether

1 it be qualified immunity or whatever it may be, a motion to
2 dismiss is a motion on the pleadings. It's not a motion
3 based on the evidence.

4 So the government or whoever the defendant is
5 couldn't move to dismiss and say they don't have the
6 evidence, they don't have the testing done. There's a fact
7 dispute. There's a factual issue that they haven't proven.
8 What it would be looking at is the pleadings alleged in the
9 complaint. And if there's a qualified immunity defense,
10 it's not one based on lack of development of the facts.
11 It's one based on the complaint as pled.

12 So she can file a civil case without the need for
13 that property and she could even -- if there were a motion
14 to dismiss, she wouldn't really need the property until that
15 case got into discovery.

16 THE COURT: Can she identify the proper defendant
17 without the evidence?

18 MR. BAUNE: It depends on what her claims are. If
19 she's talking about a 1983 claim, I'm not sure that has a
20 two-year statute of limitations and I don't think they've
21 said that it does. If they are talking about a defamation
22 claim, then they would need to know -- it's based on who
23 made the statement that is allegedly defamatory.

24 So, you know, as far as a 1983 claim, I don't
25 think that we've crossed that bridge yet where she has to

1 file or even approach that bridge where she has to file
2 that, as far as I know, at least as far as what she's
3 alleged.

4 But I'm not saying that she can never hit the
5 point of having irreparable harm, but I am saying it would
6 have to be after a complaint is filed and any motion to
7 dismiss occurs that she starts to have a need for the
8 evidence. At that point is when she needs the physical
9 evidence, not now.

10 I agree that it would be -- I can understand why
11 she would like to have it now, why it would be helpful to
12 her, but she is not irreparably harmed by not having access
13 to the evidence today and that's the standard that's
14 necessary for the Court to invoke equitable or anomalous
15 jurisdiction to hear this case. She has not made -- is not
16 there yet.

17 And I point out that the Eighth Circuit has held
18 that the court's authority to order the return of property
19 under such circumstances is extraordinary and is to be
20 exercised with caution and restraint. So for that reason
21 it's appropriate to insist upon irreparable harm and there
22 being a showing of irreparable harm now rather than to take
23 the plaintiff's argument that it would be inefficient and
24 that it would merely be helpful now. That doesn't get them
25 far enough for the court to exercise equitable jurisdiction.

1 The other argument that the petitioner made in
2 terms of arguing that she's suffering irreparable harm is
3 the need to clear her name. Now, that argument has been
4 directly addressed by the Eighth Circuit in the *4801 Fyler*
5 case in which a potential defendant said he needs access to
6 the evidence in order to clear his name. The Eighth Circuit
7 said that doesn't qualify as irreparable harm. The Eighth
8 Circuit said it understands that is a harm. We can't let
9 that one count because jurisdiction to hear these kinds of
10 pre-trial or pre-indictment motions for return of property
11 is extraordinary and if we held that potential defendants
12 get access to property in order to clear their name, we
13 would make that ordinary, it would happen all the time. The
14 *4801 Fyler* case is directly on point and directly refutes
15 that claim.

16 Now, I would like to speak -- I think that all
17 goes to irreparable harm. I would like to speak to another
18 one of the factors, which is the government's retention of
19 the evidence. I think the key here is the petitioner is
20 highlighting it as if it's a pure timing analysis. And it's
21 more than that.

22 The reason that the government is holding the
23 evidence is important and it's an important consideration.
24 The government is holding it here as evidence for a couple
25 of reasons.

1 One is, as the Court has suggested, of course the
2 government would want to introduce, in all likelihood, the
3 shrapnel itself at trial.

4 There's another issue that makes this, I think,
5 distinguishable from a lot of other cases and that is the
6 issue is the shrapnel is very sensitive evidence. The
7 question is not only what is it made out of, but what
8 residues are on it.

9 And for that reason any -- allowing anyone to have
10 access to the shrapnel itself, any third party outside of
11 the government's control, leads to a potential for
12 contamination because we're talking about not just what's
13 the shrapnel, but what's on it, what got lodged on it in the
14 blast, what chemicals are present.

15 And the petitioner here is not the only potential
16 defendant. There would be -- and I can't say too much about
17 it, but as is stated in Special Agent Vanoosbree's
18 declaration, there were other people nearby the petitioner
19 when law enforcement reported seeing a canister rolled near
20 a vehicle right before the explosion occurred.

21 If other people were charged in a criminal case
22 and the petitioner here has had access to the evidence, has
23 been able to handle it, to manipulate it, then there's the
24 potential for contamination by a third party that the
25 government would not be able to address.

1 Those other individuals would in all likelihood
2 bring claims that the property was improperly handled, that
3 it was contaminated in some way and the government would
4 have to not only -- it's one thing for the government to
5 have to defend what its experts did, that's normal, that's
6 to be expected, but the government would be in a position of
7 having to defend the petitioner's expert's examination of it
8 and that is a harm to the government's case and a potential
9 harm to its investigation.

10 And when the Court looks at that harm, I think it
11 needs to compare it to the petitioner's need for that
12 property and what is the petitioner's need for that property
13 right now. Before the Court should allow the petitioner to
14 have that access, causing that potential harm, she should
15 have to be at the point where she truly has irreparable harm
16 if she does not get it and I don't believe that she's there
17 yet.

18 THE COURT: And what's the status of the
19 investigation such that we can say she's not there yet?

20 MR. BAUNE: The status of the investigation is
21 that it's ongoing.

22 THE COURT: And so we wait for the statute of
23 limitations for the United States to bring a prosecution and
24 that's what governs it or do we look to a statute of
25 limitations that governs the United States in a civil

1 action?

2 MR. BAUNE: Right, I think there are multiple
3 statutes that the Court has to look at and it's a balancing
4 factor. The government's statute of limitations for a
5 criminal case is one factor.

6 For the plaintiff I don't think it's so much just
7 the statute of limitations for bringing a civil case. I
8 think you have to look at whether and when she reaches the
9 point of needing the evidence in a civil case.

10 Because if she files a civil case for defamation
11 and there's a motion to dismiss on the pleadings, again, the
12 shrapnel is not necessary for that because it's a
13 pleading-based motion. If it's dismissed, then she has no
14 need for it at that time.

15 If it survives that, then she can come to the
16 court and say: I've got a claim. Here is what I'm
17 claiming. I have a need for this in discovery. I have a
18 need for it now. And the Court at that point can be looking
19 at the actual case that is before it, not potential future
20 harm. You would be looking at what's actually happening and
21 be in a much better position to rule on it.

22 I note that a dismissal, as the government has
23 requested of this case, would be without prejudice because
24 it would be for lack of jurisdiction. So it would not
25 prevent the plaintiff from coming back later when her claim

1 is more fleshed out, when there's not a hypothetical harm,
2 and at that point she would be in a stronger position.

3 I can't say what the government's answer would be
4 because it's hypothetical. But I think that's the most
5 appropriate response here given the debatable nature of the
6 plaintiff's current need for it.

7 Most of the cases in which -- this case is
8 unusual. Most of the cases in which Rule 41(g) motions have
9 come up have been cases where, frankly, the government
10 should have filed a forfeiture action because it's holding
11 on to \$65,000 in currency or a million dollars in checks in
12 one of the cases and the court is concerned about allowing a
13 *de facto* forfeiture.

14 But the plaintiff has focused on the *Black Hills*
15 case, which was the excavation of Sue, the Tyrannosaurus
16 Rex, and that's, I think, a highly distinguishable case for
17 several reasons.

18 First of all, there was significant evidence that
19 this rare and unique archaeological find was suffering
20 damage because it was stored in, I think, a machine shop at
21 the University of South Dakota.

22 Second, and this is, I think, an even more
23 important distinguishing factor, there was no dispute as to
24 what the fossils were. There was no dispute that the
25 petitioners in that case were the ones who dug it up. They

1 admitted to digging it up. Everyone agreed that it was a
2 fossil. The only point to introducing the evidence would
3 have been as a demonstrative type of exhibit to show what
4 the fossil was.

5 But there was no -- the question in that case was
6 basically whether it was taken from government land or not,
7 and the dinosaur itself was not a particularly important
8 part of that inquiry. So it's very different than here
9 where you have a question as to what the shrapnel is, what
10 it's from and what's on it.

11 And the other factor, of course, in *Black Hills*
12 that clearly bothered the Eighth Circuit is that it was a
13 potential misdemeanor crime. It was a \$500 fine, I believe,
14 if they were caught. Here we're looking at a potential
15 allegation that an improvised explosive device detonated,
16 causing injury. That's a far more serious crime.

17 And the Eighth Circuit in *Black Hills* recognized
18 that in an ordinary case the equities would swallow the
19 petitioner's claim there. That was a very extraordinary
20 case.

21 THE COURT: I guess I want to push a little bit on
22 no damage or degradation to the property. It seems to me as
23 time passes and the ability to conduct an investigation of
24 this property, there is a threat to the quality of the
25 evidence, the degradation of the evidence over the period of

1 time. Why isn't that something I should be concerned about?

2 MR. BAUNE: Well, I mean, that's not fleshed out
3 at all in anything that the petitioner has -- it's the
4 petitioner's burden to show this and they haven't shown it.
5 Although they have produced an expert declaration, their
6 expert does not make any claims about that the property is
7 currently subject to degradation. It's only vaguely stated
8 by counsel. So absent that, there's no reason to -- they're
9 asking the Court to just assume that it will degrade. First
10 of all --

11 THE COURT: But we're looking at DNA evidence, I
12 believe, or blood evidence, I believe, as well as, you know,
13 any other identification that might be gleaned from this
14 evidence. It seems to me, no, it's not dinosaur bones, but
15 nevertheless it is something that has a capacity to have its
16 evidentiary value or quality degraded. Is that not
17 something that I should be concerned about?

18 MR. BAUNE: I don't think there's been any showing
19 to that effect. I understand why the Court would be
20 concerned about it.

21 The limited *ex parte* declaration that the
22 government submitted focuses only on the testing that was
23 done, and there may be some answers to that question in
24 that. The *ex parte* declaration does not generally talk
25 about anything that would be grand jury protected. It talks

1 about a sensitive investigation.

2 And so there would be some discussion of the
3 testing that is done that doesn't talk about degradation
4 per se, but it would say what is being tested, whether or
5 not there is DNA or similar evidence that's being tested.

6 Obviously I would question -- without getting into
7 it too publicly, it was removed from the petitioner's arm,
8 so there's no question it is going to have her DNA on it and
9 I don't think that is particularly indicative of anything.
10 There's no question it was -- it came from her arm.

11 The bigger question is likely going to be what
12 types of residues from either an explosion or a chemical
13 could be found on it, and I don't think there's a reason to
14 believe that those are particularly sensitive to
15 degradation.

16 THE COURT: And what's the nature of the
17 preservation of that evidence now?

18 MR. BAUNE: My understanding is that it's -- I'm
19 not certain. I know it's been recently moved back to
20 Brooklyn Center at the FBI. My understanding it is probably
21 in a storage locker in the building, but I don't know that
22 for certain.

23 THE COURT: Okay.

24 MR. BAUNE: And I would briefly like to talk about
25 the ownership issue, which is -- obviously she owns the

1 clothing, there's no dispute as to that, but there is a
2 dispute as to who owns the shrapnel. The petitioner's
3 argument is that by virtue of it being lodged in her she
4 acquired ownership interest.

5 The government has cited in its briefing a number
6 of cases in which bullets were removed from people who were
7 shot, which I think is the most analogous case, and in at
8 least three of those cases the court held not only did --
9 well, in all of the cases the court held that removal did
10 not violate the Fourth Amendment because, as in this case,
11 removal was always done by a hospital that the petitioner or
12 defendant in those cases went to of her own volition. The
13 government didn't remove the shrapnel from her. She went
14 there on her own.

15 And by going to the hospital in order to have them
16 remove the shrapnel, she is essentially abandoning or
17 consenting, I think is a better term, to the hospital
18 removing that shrapnel.

19 And the cases have held that when they give up --
20 when a person voluntarily goes to the hospital to have a
21 bullet removed, they give up their possessory right in that
22 bullet to the hospital. The *Rodriguez v. Pierce* case cites
23 that, as does *Craft v. Commonwealth*. Here --

24 THE COURT: And so what would be necessary to
25 overcome that relinquishment?

1 MR. BAUNE: Right. And I think the courts refer
2 to it as a presumption. I think that before the surgery
3 they would have to -- the person would have to go in and
4 make some sort of arrangement with the hospital.

5 THE COURT: Really?

6 MR. BAUNE: Well --

7 THE COURT: Under these circumstances? I mean,
8 let's make an argument that is helpful for looking at these
9 particular circumstances because I think that's the way to
10 fairly decide this case, or to look for analogies that can
11 be applied.

12 MR. BAUNE: Right. And it's difficult because I
13 have not found a single case where someone went to the
14 hospital to have something removed and the court held that
15 it was theirs.

16 It might be that she could eventually get it from
17 the hospital, but as of right now her claim to the property
18 is that she's the last possessor. That is her claim that
19 she's asserted. But she's not the last possessor because
20 the government didn't seize it from her. The government
21 seized it from the hospital. So I don't think the last
22 possessor analysis applies here.

23 It is a difficult question what would have to be
24 done in order to preserve it. I think there would have to
25 be some agreement with the hospital. I suppose if it wasn't

1 done before, perhaps it could be done later where the
2 hospital at some point abandons -- or agrees with the
3 petitioner. To my knowledge, that never happened here.

4 THE COURT: And for purposes of your analysis, you
5 would agree that the ownership issue only relates to the
6 Court's determination if we reach -- if I'm exercising my
7 equitable jurisdiction?

8 MR. BAUNE: That's correct.

9 THE COURT: Okay.

10 MR. BAUNE: And as I've said, there's no issue on
11 the clothing. That's obvious.

12 I'll just close, then. In summary, it's the
13 government's position that the Court need not and should not
14 reach the actual merits of this because it has to address
15 jurisdiction first. And I agree there's interrelation and
16 overlap between the two, but there's a four-part test that
17 is necessary for the Court to establish the anomalous
18 jurisdiction to hear this case in the pre-indictment mode
19 and the plaintiff has not met that standard. In particular
20 she has not yet established that there is irreparable harm
21 and she also has not established that there was any
22 violation of her rights due to either the search or
23 retention of the property.

24 THE COURT: Thank you, Counsel.

25 MR. BAKKE: May it please the Court. Randall

1 Bakke on behalf of Intervenor Morton County. We appreciate
2 the Court allowing Morton County to intervene in this
3 matter. This is a very important issue to Morton County.

4 And it's important to note we take no position in
5 relation to the jurisdiction issue. We are not requesting
6 that the U.S.A. be asked to relinquish the evidence at this
7 point. That's a matter between the U.S.A. and the
8 respondent and I think all the arguments have been made.

9 But 41(g) of the Rules of Criminal Procedure
10 addresses what can happen in the event the court does
11 exercise jurisdiction and one of the things that 41(g)
12 addresses is that the court may impose reasonable conditions
13 to protect access to the property and its use in later
14 proceedings.

15 And that is Morton County's concern, is access to
16 the evidence and use of it in the later proceedings, and
17 what we have requested of the Court, if the Court does
18 assume jurisdiction, is that all interested parties have
19 access to that evidence, that it be stored at some neutral
20 location, that there be protocols and safeguards put in
21 place so that all the interested parties in addition to
22 Ms. Wilansky can have access to the evidence, can conduct
23 testing, can develop a protocol among the experts for the
24 various parties so that we can avoid any of these potential
25 spoliation issues that could arise later.

1 They've agreed in part to that. They say, well,
2 their expert would not -- Dr. Buc would not do anything to
3 degrade the evidence. But, of course, we don't have any
4 information in regards to what Dr. Buc would supposedly do
5 or whether that would provide adequate safeguards.

6 And of course they argue, well, you can bring a
7 spoliation motion later in a civil proceeding, but, as I'm
8 sure this Court is aware, spoliation proceedings are not
9 often successful. They're a last resort. They're not a
10 preferred method of trying to gain access to the evidence or
11 deal with evidentiary issues. The common practice is that
12 all the parties have access.

13 And here today I only represent one potential
14 interested party, which is Morton County. Morton County is
15 the location where this event occurred. Morton County had
16 law enforcement there through the sheriff's department.

17 But the Court may be aware this was a very large
18 protest involving thousands of protesters. In fact, we had
19 officers in North Dakota from virtually all the sheriff's
20 departments throughout the state, many of the police
21 departments and law enforcement from outside the state of
22 North Dakota assisting with the protests.

23 And so at the time this event occurred, the law
24 enforcement officers that were there were not limited to
25 Morton County and so there are many other potential

1 defendants.

2 And, of course, we have no crystal ball as to who
3 the plaintiff might choose to name as a defendant in a civil
4 lawsuit, which would necessarily have to be initiated in
5 North Dakota, but those parties as well would have an
6 interest in this evidence and that's why it's so important
7 that if the Court does exercise jurisdiction, that there be
8 those type of reasonable conditions of access to the
9 evidence which would apply to all the interested parties
10 because, as indicated, we suspect there would be additional
11 parties included.

12 One of their arguments is that the evidence is not
13 germane to Morton County's defenses in this case. In fact,
14 this shrapnel could be a very important element of defense
15 in this case because Morton County and other law enforcement
16 take the position that this explosive device, as they've
17 denominated it, did not come from law enforcement.

18 In fact, we believe the evidence will be that this
19 type of explosive device was not even part of the arsenal of
20 what law enforcement had available to it at the time of
21 these protests. And so this will, in fact, be an important
22 piece of evidence, both the clothing of Ms. Wilansky and the
23 shrapnel.

24 And you have probably seen from the photograph
25 taken at the Hennepin County Medical Center that the remain

1 of the shrapnel, which is attached as Exhibit 1 to
2 Mr. Stoll's affidavit, is very small.

3 And so what happens if testing should occur? If
4 that testing is destructive testing, will there remain
5 enough material so that others could engage in their own
6 testing? I mean, there's a lot of issues that would have to
7 be sorted out in --

8 THE COURT: I will admit that much of my
9 preparation has been focused on the shrapnel itself. Would
10 you tell me a little bit more about the nature of the
11 clothing and, you know, what it is, how it would be useful
12 for this investigation.

13 MR. BAKKE: Sure. And of course when we got this
14 notice that this motion had been filed, that was our first
15 notice that they were potentially hiring experts or had
16 hired experts because, of course, there's no civil lawsuit
17 and so we're playing catch-up.

18 And without getting into communications we may
19 have had with experts, I can tell you that chemical analysis
20 of the clothing and chemical analysis of the shrapnel and
21 possibly metallurgical analysis of the shrapnel may shed
22 light on who the manufacturer of this device was, what the
23 metal constituents were, which could potentially rule in or
24 rule out certain devices.

25 And so all of that will be relevant information in

1 terms of having access to the evidence and having some sort
2 of testing done that is agreed upon jointly by the experts,
3 as often occurs, for all the interested parties.

4 In relation to who owns the evidence, to us it
5 seems like Ms. Wilansky is arguing out of both sides of her
6 mouth. On the one hand she's saying it came from Morton
7 County or other law enforcement, but instead here when it
8 serves her purposes she's coming into this court and trying
9 to argue that she owns it and she possesses it and that she
10 was the original owner of this.

11 We expect in our lawsuit that she's going to claim
12 the opposite, that she's going to claim that the original
13 owner of this property was Morton County or some other law
14 enforcement entity.

15 So to us it seems there's an inconsistency there
16 in the argument they're making to the Court and we think
17 they will later change their position.

18 It is important for this Court --

19 THE COURT: Help me understand why that ownership
20 analysis matters to you at this juncture.

21 MR. BAKKE: Well, I don't know that it does other
22 than to point out the contradiction. I think Mr. Baune hit
23 the nail on the head when he answered a very similar
24 question from the Court and indicated that Ms. Wilansky did
25 not possess it, it was Hennepin County. And that evidence

1 came from Hennepin County in response to the government's
2 requests and was not taken from Ms. Wilansky. I'm just
3 pointing out what I think will be a later contradiction in
4 the claims that we expect to be made in the civil lawsuit.

5 You know, I think it's important for this Court to
6 also be aware that there has been a very large amount of
7 pre-suit discovery done by Ms. Wilansky through her
8 attorneys. There have been many what we call in North
9 Dakota open records requests that Mr. Stoll has sent and our
10 office on behalf of Morton County and other law enforcement
11 entities has assisted in responding to, very similar to a
12 FOIA request.

13 And so they have a great deal of information that
14 they have been able to obtain through these open records
15 requests. There are some that we have objected to under our
16 applicable North Dakota open records statute, but many have
17 been responded to. And so they have a significant advantage
18 over your typical plaintiff who is investigating and trying
19 to determine whether they should bring claims.

20 And that kind of leads me to the issue of this
21 defamation claim, which is very curious to me because it
22 seems to me that if Ms. Wilansky is going to pursue a
23 defamation claim against Morton County or some other law
24 enforcement, she has whatever evidence she needs in that
25 regard and that's her own testimony. Often defamation

1 claims are initiated where a party says: This wasn't me.
2 You falsely accused me. I was there. It didn't happen.

3 So she can start a defamation lawsuit if she wants
4 to at this time and she can go on in her complaint and say
5 upon information and belief, it's my belief that when I have
6 access to the evidence currently in the possession of the
7 U.S.A., that will further bolster my defamation claim. I'm
8 not saying that would have any merit. We believe that that
9 would not survive a motion for dismissal based on immunity.

10 And bear in mind here, you know, what's getting
11 overlooked I think in all of this is the fact that just
12 because she's saying the explosive device didn't come from
13 her and Morton County and law enforcement is saying it
14 didn't come from us, that doesn't rule out the possibility
15 it came from someplace else. As I indicated, there were
16 many, many protesters present at the time. It very well
17 could be that this explosive device came from another
18 protester that's not Ms. Wilansky.

19 And I note that in none of the exhibits or
20 evidence presented to this Court have they given you any
21 information to suggest there was some type of affirmative
22 statement by Morton County blaming Ms. Wilansky. They
23 haven't provided a newspaper article. They haven't provided
24 a quote. They haven't provided news media coverage.
25 Nothing. They're just saying, well, we think they're going

1 to blame Ms. Wilansky if a defamation lawsuit is started.

2 And so I think this defamation issue is kind of a
3 pretext to try to gain access to the evidence, but certainly
4 there's nothing holding them back from starting a defamation
5 lawsuit. I think it would be dismissed early based on
6 immunity, but there's certainly other possible sources in
7 regards to whatever it was that injured her.

8 And in regards to the irreparable harm issue, one
9 of the things that she argues is that, well, I have a lot of
10 medical bills. Well, that's not irreparable harm. I mean,
11 in many personal injury cases the party has a lot of medical
12 bills. And we ask ourselves the question: If that's the
13 basis for her irreparable harm argument, why hasn't she
14 started the lawsuit already?

15 And in terms of irreparable harm, if the device
16 came from another protester, which it very well could have,
17 that counters her irreparable harm argument.

18 And Morton County has an absolute right, as do
19 other law enforcement, to assert in response to a claim made
20 by Ms. Wilansky's father that this device came from law
21 enforcement to say, no, it didn't. That's not defamation,
22 to simply defend yourself and say it didn't come from us,
23 it's not part of our arsenal.

24 And so I think the defamation claim, you know --
25 and even Mr. Stoll conceded that he believes there's

1 accusations, quote, potentially including Sophia herself,
2 end quote. So that seems to me to be an acknowledgement
3 that there isn't a viable defamation claim there.

4 In regards to the lawsuit and the Court asked
5 about the statute of limitations --

6 THE COURT: Why is that evidence that there isn't
7 a viable lawsuit?

8 MR. BAKKE: If there was testimony that it
9 potentially included her, because that's simply Morton
10 County defending itself, and I don't think they ever said
11 that, but saying "potentially" doesn't rise to the level of
12 the defamation requirements under North Dakota law. There's
13 certain elements that you have to establish, and potentially
14 being defamed doesn't qualify. It won't meet our elements.

15 THE COURT: Thank you. I wanted to make sure I
16 was tracking your argument.

17 MR. BAKKE: Sure. Okay. I should have made that
18 more clear.

19 In regards to the statute of limitations issue,
20 I'm involved in many cases currently and many cases in the
21 past defending law enforcement. I can tell you that
22 plaintiff's lawyers routinely take the position in North
23 Dakota that the statute of limitations on Section 1983
24 claims is a six-year statute of limitation in federal court.
25 And so I think the statute of limitations argument really is

1 not a basis here for Ms. Wilansky to get early access to
2 this evidence.

3 And let me give you an example. I would
4 suspect -- let's say we play this out and there is some
5 testing done and we're involved in the testing and others
6 are involved in the testing and Ms. Wilansky's experts are
7 involved in the testing. As this Court is aware, there are
8 often disagreements between experts on what the evidence
9 means. I would suspect this case may be no different, that
10 you may have a divergence of opinions.

11 I don't think that there's going to be definitive
12 evidence, that Ms. Wilansky is going to get every party to
13 concede, in regards to what this shrapnel means or what the
14 test results mean. So under her theory she could never
15 start a lawsuit until there was unanimity in regards to what
16 the test results meant or showed. As this Court is aware,
17 in a civil situation that rarely occurs. There's often
18 differing opinions as to what the evidence means.

19 And so even as an example, there might be an
20 allegation -- and I'm just, you know, giving the Court a
21 hypothetical. She could say, even if the test results by
22 her own expert showed that it was an explosive device, she
23 could argue, well, I think there was another explosive
24 device that caused a propane tank to explode and that's what
25 ended up in my body, which was precipitated by the explosive

1 device. I mean, there could be many different theories that
2 aren't tied to definitly in terms of what this metal shrapnel
3 or the residue on her clothing is.

4 And once again, as I said before, she can make
5 allegations based upon information and belief. She could
6 initiate the lawsuit and ask the Court to hold discovery in
7 abeyance, could ask the Court to conduct discovery early in
8 regards to the shrapnel and the clothing. I mean, there's
9 many things that could be done.

10 The Court asked the question can she identify the
11 proper defendants in a civil lawsuit, and she has the
12 information she needs in that regard because bear in mind
13 here law enforcement takes the position this device did not
14 come from us, period, and so doing some testing would not
15 shed any light on the individual or law enforcement entity
16 that supposedly launched this because our investigation
17 reveals it didn't come from law enforcement. So no amount
18 of discovery is going to change that. Whatever information
19 she believes she has to start a lawsuit against law
20 enforcement --

21 THE COURT: So she has to take your word for it?

22 MR. BAKKE: No. She can conduct discovery on
23 that, but I don't think there's going to be any evidence to
24 suggest this was even part of our arsenal or that it came
25 from any law enforcement entity. Sure, I suppose that could

1 change. Maybe there's something we're not aware of at this
2 point. Maybe somebody changes their testimony. Anything
3 like that is always possible.

4 My only point is she has what she needs now based
5 on these public records requests to know who was there, who
6 the different law enforcement entities were, and if she
7 deems it appropriate to initiate suit.

8 The Court is also aware, I'm sure, that what
9 routinely happens in these civil lawsuits if there's an
10 individual defendant who is unknown, it's very common to
11 name John Does A through Z or 1 through 20 or however they
12 want to do it. We see that with some frequency in
13 Section 1983 claims because they can't always know on the
14 front end who those individuals might be. I'm merely
15 pointing out that to say, well, she can't start it because
16 she can't identify all the individuals she thinks are the
17 proper defendants, those types of lawsuits get initiated all
18 the time.

19 THE COURT: And if that lawsuit were initiated,
20 you would not be contesting access to evidence pertaining to
21 further identification of actions that your own client would
22 be allegedly liable for?

23 MR. BAKKE: Well, I think subject to a protective
24 order, and we're kind of getting a bit into another area,
25 but I can --

1 THE COURT: Well, you've taken me straight there,
2 I think --

3 MR. BAKKE: Sure, sure.

4 THE COURT: -- based on your arguments. I was not
5 expecting to go there, but now that you've raised the
6 issues, I think it needs to be clearly and carefully defined
7 if you're presenting it to me for some consideration.

8 MR. BAKKE: Sure, and I absolutely will.

9 There is another case that arises as a result of
10 the protests called the *Dundon v. Morton County, et al.*
11 case. That case has been to the Eighth Circuit Court of
12 Appeals based on Judge Hovland's decision denying the motion
13 for preliminary injunction by the plaintiffs. It's about
14 nine plaintiffs who claimed personal injuries during the
15 protests and a purported class action. The case is now back
16 before Judge Hovland.

17 In that case, because of death threats to law
18 enforcement, certain records have been sealed and there is a
19 protective order in place in that case, but there's been
20 some very legitimate concerns in regards to substantiated
21 death threats against officers and their family members.

22 So the reason I'm hesitating to answer the Court's
23 question about would these individual officers be
24 identified, subject to restrictions that we believe would be
25 necessary and are already in place in a companion case, I

1 think that information would be released and dealt with in a
2 similar fashion to the way it has been in the *Dundon* case.

3 I hope that answers the Court's question.

4 THE COURT: That's helpful. Thank you.

5 MR. BAKKE: You know, they say we can subpoena the
6 shrapnel from the petitioner, but we can't subpoena the
7 shrapnel from the petitioner because there is no lawsuit. I
8 mean, we have no ability in a civil action until they start
9 one to do that. And once again, that doesn't afford us the
10 access and safekeeping we need to have assured in the
11 meantime.

12 So really what we're asking this Court to do, if
13 it does exercise jurisdiction, is have this evidence, the
14 clothing and the shrapnel, placed in the possession of an
15 agreed-upon neutral third party laboratory in the
16 Minneapolis/St. Paul area, that there be an access protocol
17 set up agreeable to all the parties and confirmed by the
18 Court which would allow all interested parties access to the
19 evidence for purposes of photographing, visualizing,
20 testing, subject to agreement by all the parties to make
21 sure those types of safeguards are in place in regards to
22 access and use of the evidence in any potential civil
23 proceedings.

24 Thank you.

25 MR. STOLL: Thank you, Your Honor. I want to

1 start by addressing what appears to be the main argument by
2 both the federal government and Morton County, which is that
3 Sophia Wilansky could file a civil suit against somebody
4 without the shrapnel. And that is true, but it is not at
5 all the question that's at issue in this case. That is not
6 the test that Sophia has to meet and that is not the
7 standard to be applied here.

8 The test on the merits in this case is whether the
9 government has held the property for an unreasonable amount
10 of time and whether the petitioner has shown a right to that
11 property. She doesn't need to show that she needs the
12 property to file a suit or that she needs it for some other
13 particular reason to meet the fact that she has a right to
14 that property.

15 On the issue of irreparable harm, which I think
16 the lawsuit issue does speak to, it's worth reiterating what
17 a low bar there is for irreparable harm in the Rule 41(g)
18 context. Oftentimes it's getting conflated here with the
19 preliminary injunction standard, which is a different
20 standard.

21 If I can just quote the Seventh Circuit from
22 Mr. Lucky here just to explain what the bar looks like on
23 the standard. The court said, (As read) "Whenever the
24 government seizes property, in this case money, and
25 withholds it for an unreasonable length of time without

1 bringing charges and without offering evidence to justify
2 its continued withholding and without any indication as to
3 when, if ever, charges will be filed, the plaintiff suffers
4 irreparable harm." That's it.

5 That is clearly the case here. The government has
6 held the property for an unreasonable length of time. It
7 has not brought charges. It has not offered Sophia any
8 evidence of how long it's going to hold the property or when
9 it's going to issue charges. And so Sophia suffers an
10 irreparable harm there.

11 You know, Mr. Lucky is not an outlier in this
12 respect. Morton County noted that her medical bills aren't
13 irreparable harm, but I think they absolutely do satisfy the
14 standard. In several cases the courts have held that just
15 being deprived of cash is sufficient irreparable harm. So
16 Mr. Lucky is one of those situations. His only need for the
17 cash was to pay his taxes. Here she just needs the property
18 to pursue a remedy for her medical bills.

19 THE COURT: And what constitutes an unreasonable
20 length of time?

21 MR. STOLL: Well, I think that --

22 THE COURT: I mean, what am I measuring against?
23 Am I looking to a statute of limitations? Am I looking to
24 some evidence of degradation of evidence?

25 MR. STOLL: The courts are not super clear in this

1 respect, Your Honor. I do not think you are looking to the
2 statute of limitations. No court that I have seen has used
3 that as the metric for the length of time.

4 I think what the courts are trying to do is that
5 they look at the nature of the case and they say could the
6 government have either completed its investigation if it was
7 being diligent and brought some charges or could the
8 government have completed its need for the evidence in terms
9 of testing it and then be operating off of alternatives or
10 substitutes. That's why you're seeing -- you know,
11 consistently at 17, 18 months or less courts are saying you
12 have to give the property back.

13 The courts are not super clear about sort of the
14 metric that they're using to say 17 or 18 months is enough,
15 but I think the substance of their decisions suggests that
16 at that point the government, if it was acting diligently,
17 could have brought charges or should be relying on
18 substitutes because of how long the private citizen has been
19 deprived of their property.

20 THE COURT: And here we're talking about the
21 deprivation of a potential piece of evidence that was a part
22 of your client's body?

23 MR. STOLL: Yes.

24 THE COURT: The shrapnel?

25 MR. STOLL: Absolutely. And I can speak to the

1 ownership interest there. You know, the federal government
2 noted that, you know, our argument is that she's the last
3 possessor and that's not true because Morton County Medical
4 Center had it afterward. But that actually flips the
5 argument on her head, right?

6 Her ownership interest comes from her being the
7 first known possessor of the property, and the law on that
8 is that subsequent possessors don't trump a prior
9 possessor's property interest. So the fact that she's the
10 first known person to have found this property, found it by
11 having it lodged in her body, is what gives her an
12 entitlement to it.

13 THE COURT: Why don't we look to where it came
14 from as that's what --

15 MR. STOLL: Morton County has suggested that
16 there's an inconsistency here, but in a world in which
17 Morton County is claiming that it absolutely disclaims any
18 sort of possessory interest in the property and says it
19 didn't come from its munition, I would say that if we are
20 eventually able to show that it did come from Morton County,
21 they abandoned it and at that point Sophia then found it
22 when it got lodged in her body and she becomes the owner of
23 it.

24 If Morton County or whoever, you know, had the
25 munition that eventually got lodged in her body comes

1 forward with evidence that it had title to that item before
2 Sophia did and that it didn't abandon it, then Sophia would
3 have to give the property over to that party. But no party
4 is willing to come forward and at that point it's found
5 property.

6 The federal government -- in fact, both
7 governments cite to these sort of bullets cases where
8 they're removed at hospitals, and I think the key point
9 about those cases are that the underlying possessory
10 interest of the victim in those cases isn't really at issue
11 in those cases. The question there -- they were all
12 suppression of evidence cases and they were all decided on
13 the fact that either there wasn't a government actor because
14 the surgeon who removed it wasn't a government actor or the
15 victim lacked a privacy interest and so there wasn't a
16 search. But victims can lack a privacy interest in
17 something that is nonetheless their property all the time.

18 So the courts didn't need to decide the possessory
19 interest question to decide those cases. It wasn't really
20 queued up for the court in those cases. So to the extent
21 that they commented on it, I think it's clearly dicta. None
22 of the cases cited by the governments on this are
23 controlling to you or to this court.

24 You know, I would suggest that those cases may be
25 wrongly decided and that there's some -- the Court should be

1 concerned about issuing a ruling that says that somebody who
2 is brought into a hospital while unconscious and a surgery
3 was performed on them somehow forfeited all their possessory
4 rights to whatever was removed from their body and
5 therefore, you know, the government is free to take that
6 from them.

7 I think in a case in which -- you know, you could
8 imagine how blood removed from somebody during a surgery,
9 the government could swoop in and grab that blood. That's
10 extraordinary private property to the person from whom it
11 was removed. I'm not --

12 THE COURT: Yes, but the government is always
13 doing tests on fingerprints or blood left at a scene and it
14 seems to me -- I don't see that that is particularly
15 invasive as you are trying to address it.

16 And the fact that someone was in a place and left,
17 lawfully or not, left blood behind when they were harmed, it
18 seems to me that doesn't give them the right to tell the
19 owner of that place that they can't give access to someone
20 else to determine whether it's the blood of the person who
21 is bringing the lawsuit or claiming the harm that has
22 occurred. This seems really attenuated.

23 MR. STOLL: Again, Your Honor, I would say that
24 there's -- I would distinguish between the question of
25 whether the government had a right to take the shrapnel or

1 the blood or the bullets in the first place and whether the
2 shrapnel or bullets or the blood is at its base owned by the
3 victim. Those are two different questions.

4 And the government -- you are absolutely right,
5 the government is allowed to take a citizen's private
6 property subject to warrants, subject to probable cause,
7 subject to subpoenas all the time.

8 THE COURT: Is this different from fingerprints?

9 MR. STOLL: Well, in a fingerprint case there's no
10 item that sort of results from the government's test that
11 could be given back to the person. Right? They still have
12 their fingers and their fingerprints. The government --

13 THE COURT: So your client wants her blood?

14 MR. STOLL: My client wants the shrapnel back --

15 THE COURT: Okay.

16 MR. STOLL: -- because it's her property. She
17 found it. Nobody is claiming prior possession of it and the
18 law says that that makes it hers.

19 And I think the only case that I've seen on the
20 question of possessory interest in the context of a
21 Rule 41(g) case is this *Government of Virginia Islands v.*
22 *Edwards* case and that was a case in which the government
23 confiscated jewelry from somebody who was a known burglar
24 and who eventually got convicted of stealing jewelry.

25 But the government was not able to show that the

1 particular jewelry it seized was actually owned by somebody
2 else and so the court required the government to return that
3 jewelry, even though it was probably stolen property, to the
4 person who they took it from, to the criminal defendant.

5 And I think that just goes to establish that, you know, the
6 possessory interest -- the person who actually was in the
7 possession of the item is the critical piece here.

8 So that's sort of the ownership interest piece,
9 but I think it's important to remember that the ownership
10 interest, the irreparable harm, inadequate remedy, these are
11 all factors that the Court is balancing just to determine
12 jurisdiction.

13 And Sophia doesn't need to meet or establish by
14 some, like, high burden every one of these factors. They're
15 all balanced together just to determine whether this is the
16 type of case the Court should hear.

17 And courts do hear cases where the petitioners
18 don't establish callous disregard or don't establish
19 irreparable harm. *Ramsden* is an example of a case from the
20 Ninth Circuit where the court held explicitly that there was
21 no irreparable harm, but still took jurisdiction over the
22 case and still ordered the return I believe in that case it
23 was business documents.

24 I think it's important to address the *Fyler* case
25 that the federal government brought up because they claim

1 that that is on point here and I think it's worth delving
2 into the facts of that case because, number one --

3 THE COURT: Before we go there, so fingerprints,
4 would we be in the same position here if we were talking
5 about fingerprints left behind?

6 MR. STOLL: I don't think so, Your Honor, because
7 I don't think that the -- the fingerprints are left at a
8 scene. First of all, I think they are probably abandoned to
9 the extent that they're objects. So if you were at a crime
10 scene and you touched something and then you walked away,
11 you're not -- you're evincing a pretty clear intent not to
12 come back and get the residues from your fingers back. So
13 there's no possessory interest there.

14 But also it's not really a tangible object that
15 could be returned. I mean, once the government dusts for
16 the prints and does its analysis, I mean, my understanding
17 is that the government has sort of a lab result, but then
18 there's nothing else there to return.

19 THE COURT: So make sure I am focusing on the item
20 that you're talking about being able to be returned or not
21 being able to be returned.

22 MR. STOLL: Correct. The item at issue is the
23 shrapnel --

24 THE COURT: Right.

25 MR. STOLL: -- the actual 1 millimeter by

1 1 millimeter piece of metal and whatever else is stuck on
2 there at this stage. That's what we are interested in
3 having returned because that item --

4 THE COURT: Why isn't whatever is stuck on there
5 the equivalent to the fingerprints as opposed to the
6 shrapnel itself?

7 MR. STOLL: Well, it's hard to say at this point,
8 Your Honor, because I don't know what is, in fact, stuck on
9 there. The government hasn't disclosed that to us. So I'm
10 arguing a little bit at a disadvantage here.

11 But let's imagine there's tissue on there. That
12 tissue is probably Sophia's tissue, so that would be her
13 property in the same way that, you know, a bone fragment
14 that was removed from her arm would be her property or, you
15 know, muscle tissue that was removed from her would be her
16 property. You know, that's biological matter that belongs
17 to her.

18 If there's residues on there, I mean, we would
19 have to look at the residues to see whether the residues are
20 also her property or not. She was certainly in possession
21 of those residues at the time that they were removed from
22 her body and given to the government, and nobody has claimed
23 a prior possessory interest in those residues. So I would
24 think that the residues, even though they are, you know,
25 barely tangible, are her property as well.

1 I am having trouble with the fingerprint analogy
2 just because -- I mean, I guess I'm failing to see what the
3 tangible property that results from the fingerprint is. I
4 mean, I guess it's like the oils from the finger that are on
5 the object. My guess would be that in most cases the
6 dusting for fingerprints process destroys that, so there's
7 nothing to return to the individual.

8 So I think the combination of the abandonment of
9 your fingerprint residues as a general matter and the fact
10 that they're usually probably destroyed in the dusting
11 process or somehow altered and not preserved, there's
12 nothing to return in a fingerprinting case; whereas, in this
13 case the residues -- if there is still residue on that
14 shrapnel, there is something there to be returned to the
15 petitioner.

16 THE COURT: Residue of what kind?

17 MR. STOLL: I think that regardless of what it
18 ends up being -- what that residue ends up being, that
19 residue was in Sophia's possession when she arrived at the
20 hospital and she never evinced an intent to abandon the
21 residues or the shrapnel and as soon as she had an
22 opportunity she started, via her father, her agent, calling
23 government agencies and saying, hey, I'm just making a point
24 of pointing out I think this is my property, I'm not
25 abandoning it, I want it back.

1 The government's sort of contention that Sophia
2 had to somehow make a deal with the hospital before the
3 surgery saying that she wanted the shrapnel back I think
4 borders on the absurd.

5 I mean, between the point at which Sophia was
6 injured and the point at which the shrapnel was extracted
7 from her body, I don't think she was -- I think she was
8 essentially unconscious the entire time. So it would be
9 basically an impossible standard to meet, to say that she
10 had to somehow make a deal with the hospital beforehand.

11 Can I turn to the *Fyler* case?

12 THE COURT: Yes.

13 MR. STOLL: Okay. So the federal government cites
14 this as a case where there was no irreparable harm, and I
15 think it's important to note what exactly the details of
16 that case were because that was a case in which the harm
17 being claimed was that the petitioner was worried that the
18 government was going to file an indictment against it and
19 that that would be an improper indictment and that would
20 harm its reputation.

21 And it is true that the court said that that is
22 not an irreparable harm, but that is not the situation here.
23 This is a situation in which government agents and the media
24 have made overt public accusations against my client. So
25 this isn't some fear of a future indictment. This is an

1 already manifested accusation against my client that harms
2 her reputation.

3 And, in fact, if the *Fyler* case is analogous to
4 anything, it's analogous to Morton County's position here
5 because Morton County is in the position of saying its only
6 interest here is in the fact that it worries that it will
7 someday be a defendant in a case where the shrapnel becomes
8 evidence. And in that case I agree with the *Fyler* decision
9 that that is not a sufficient interest and it's not
10 sufficient irreparable harm to have standing to have any
11 right to the property.

12 The other thing I would note about the *Fyler* case
13 is that the court also found that there was no callous
14 disregard of the petitioner's rights. There were other
15 bases upon which the court decided not to exercise
16 jurisdiction and one of the sort of main factors that the
17 court considered was the fact that the government gave the
18 petitioner access to the documents that he wanted to see.

19 So business documents were seized. The petitioner
20 wanted them back. The government said we're not going to
21 give them back, but you can come and you can copy them, you
22 can read them, you can access them. So the court said in
23 that respect you have everything you need because you have
24 the documents.

25 But in this case, you know, Sophia has asked for

1 the analogous relief, which is you keep the shrapnel, allow
2 our expert to come and analyze it in your presence and make
3 sure that we have a full understanding of what the shrapnel
4 is. And the government has said no to that. So the
5 government is, you know, not taking the same position in
6 this case that it did in the *Fyler* case.

7 On the issue of the potential for contamination
8 and degradation, which seems to be the federal government's
9 other main concern, really the only concern that they've
10 articulated about what harm they'll suffer if the shrapnel
11 is returned, what I would say to that is, one, the
12 government has already completed its testing. So for
13 purposes of the government's evidence, the government has
14 what it needs. It has the lab results.

15 Number two, this particular issue is directly
16 addressed head on in the getaway car example in the Eighth
17 Circuit case. The Eighth Circuit case explained there that,
18 tough, if the government holds the property for too long,
19 they have to make do with the alternatives, such as the lab
20 results and the fingerprint evidence and the pictures. You
21 have to return the object.

22 And the last thing is, you know, again, we've
23 offered the government on numerous occasions the compromise
24 of them keeping possession of it while Sophia's expert is
25 granted access to analyze it. Sophia's father offered that

1 deal to Agent -- to Mr. Delorme, who rejected it. We have
2 offered that compromise in every one of our pleadings in
3 this case. The government has never explained why that
4 compromise would be prejudicial to any of the government's
5 investigations or interests.

6 And with respect to the issue of other potential
7 criminal defendants wanting access to this property, the
8 government would still have the property and would have
9 always maintained chain of custody of that property and
10 could give access to that property to the other defendants.
11 So I don't see how the contamination issue really helps the
12 government here, especially with respect to our compromise
13 position.

14 You raised the question of whether, you know, the
15 shrapnel may be sort of degrading while it's in the
16 possession of the government. And the government's argument
17 is, well, Sophia hasn't made that showing. I would submit
18 to you, Your Honor, that --

19 THE COURT: What showing?

20 MR. STOLL: That Sophia has not met its sort of
21 burden of persuasion that the shrapnel is currently
22 degrading while it's in the federal government's possession.
23 And I would suggest that we are not required to make that
24 showing.

25 THE COURT: Why not?

1 MR. STOLL: The government hasn't given us any
2 information about how it's storing the shrapnel or what's --

3 THE COURT: But don't you have the burden of
4 establishing degradation?

5 MR. STOLL: I don't think so. I think at this
6 point we are required to make a good-faith suggestion that
7 it's a possibility. And we have made that suggestion.
8 Things dissipate over time. The government is running
9 testing on it. They have not supplied us with any
10 information about what kind of testing they are doing or how
11 that is affecting the shrapnel. And, you know, property --
12 or biological material and residues erode over time.
13 Without some information from the government about what
14 these materials are and how they're being stored, I don't
15 see how Sophia could possibly be in a position to sort of
16 make a showing of that.

17 The last thing I would say is just with respect to
18 Morton County's position on this, you know, Morton County
19 says that all they're asking for here is that all the
20 interested parties in this action have access to the
21 shrapnel. And my position is Morton County is not an
22 interested party here. They affirmatively disclaim any
23 possessory interest in the shrapnel.

24 The only interest that they assert in this whole
25 case is that they are worried that they might be subjected

1 to a lawsuit and that they want to be able to defend
2 themselves. And that's fine, but they have cited no legal
3 authority and I am aware of no legal authority that suggests
4 the government is allowed to deprive a private citizen of
5 that citizen's property simply because the government thinks
6 that the private citizen may sue the government. And if the
7 government were allowed to do that, I would have serious
8 concerns over, you know, the government taking away property
9 that citizens need to --

10 THE COURT: Is it depriving of property or
11 preservation of important property to both or all three
12 parties?

13 MR. STOLL: Well, it's depriving Sophia of her
14 possession of the property. Morton County has asked that it
15 be held not in Sophia's possession, so it is clearly taking
16 away her property. I agree that she's being granted access
17 to it, again, a compromise with the federal government that
18 we have, in fact, offered.

19 But I would say in civil litigation would-be
20 defendants don't get to, prior to the filing of any
21 litigation, just go take or demand access to a private
22 citizen's property.

23 The appropriate remedy in a situation like this is
24 a spoliation sanction and, you know, Morton County says
25 that's a less than ideal remedy for it and I think that

1 that's probably true, but it is a much more suitable remedy
2 than taking away a private citizen's property or depriving
3 her of possession of it prior to any litigation against
4 Morton County.

5 Just to clarify a couple of things.

6 THE COURT: And help me. Where would the -- when
7 you say depriving of possession, is there any commitment to
8 maintaining the property in any particular way?

9 MR. STOLL: Yes. So Sophia's expert, Dr. Buc, has
10 a lot of experience maintaining precious artifacts,
11 including ones that are going to be used by law enforcement
12 as evidence. She is a forensic chemist and works quite
13 closely with law enforcement. So she will preserve the
14 evidence so it does not continue to degrade and she will,
15 you know, make -- we already agree that under appropriate
16 authority, if it was subpoenaed by a third party or the
17 government asked for it for use in a trial, we would comply.

18 So we're not looking to destroy the property or
19 abscond with it. We are simply looking to have possession
20 of it so that we can test it sort of on our own timetable.
21 And if we need to sort of run a test, go back and analyze
22 the results, test it again, we have the ability to do that.
23 My only concern --

24 THE COURT: Does testing degrade the property?

25 MR. STOLL: What was that?

1 THE COURT: Does testing degrade the property?

2 MR. STOLL: The testing that our expert has
3 proposed will not degrade the property because it's largely
4 just taking photographs of it under extreme magnification,
5 measuring it. Another thing that our expert would like to
6 do is put a magnet up to it to determine whether it's
7 magnetic or not. But none of those things would actually
8 change the chemical composition of the property or degrade
9 it.

10 I think, depending on what we find with the
11 shrapnel, there could be an issue down the road in which,
12 you know, one of the parties here wanted to do destructive
13 testing, but I think that would be a whole different thing
14 and we could try to reach an agreement about it or we could
15 end up back before Your Honor on that question.

16 Just to clarify a couple of things from Morton
17 County, Your Honor.

18 We have filed numerous open records and FOIA
19 requests, but they have almost entirely been denied. So the
20 idea that we have all this information from free discovery
21 is not true.

22 So just to give you an example, we did file FOIA
23 requests asking what munitions were law enforcement carrying
24 on the night Sophia was injured. They refused to supply
25 that information. We asked who were the officers who were

1 present on the night that Sophia was injured. They refused
2 to supply that information. Both the FBI has refused to
3 supply that information and Morton County has refused to
4 supply that information. So we have tried to gather the
5 evidence in reasonable ways and we have largely been denied
6 that evidence at every step of the way by the governments.

7 And in terms of the defamation claim, Morton
8 County suggested that we have not actually asserted that
9 anybody has made defamatory statements about Sophia, but,
10 you know, that also is not true.

11 Lieutenant Iverson from Morton County has made
12 statements to the news media about protesters that were
13 involved with Sophia making these propane tank bombs and he
14 issued pictures of charred propane tanks to the media, which
15 then obviously published stories about how the protesters
16 were making, you know, improvised explosive devices.

17 In addition to that, Sheriff Paul Laney --

18 THE COURT: And so is that tied to or tethered to
19 Ms. Wilansky, she's identified, or you're saying --

20 MR. STOLL: Yes.

21 THE COURT: -- she was a protester and they're
22 saying protesters did X?

23 MR. STOLL: I would have to go back and look at
24 the exact statements before I would want to precisely
25 characterize them, but what I can say is that Lieutenant

1 Iverson made it clear that Sophia's injury was caused by a
2 group of protesters near her in conjunction with her trying
3 to make IEDs and he certainly suggested that in such a way
4 that the news media then ran stories saying that Sophia was
5 party to the creation of explosive devices for use against
6 law enforcement.

7 THE COURT: But isn't that a claim against the
8 news media?

9 MR. STOLL: Well, I would say when Iverson sort of
10 gave statements to the press about it publicly, that would
11 defame Sophia. Again, I would need to see the exact
12 statements before I want to characterize them, but the other
13 thing --

14 THE COURT: Well, but you can't be making these
15 arguments without any foundation in fact. It seems to me if
16 you aren't able to say with certainty in answering my
17 question -- and I'm not saying you should know the record so
18 completely -- you can say I don't know, but I don't want
19 this supposition that slips into characterizations that are
20 not true as to what statements, which are verifiable, can be
21 attributable to particular individuals.

22 So it's fine for -- this is a complex set of
23 circumstances. There were lots of moving parts both at the
24 time and subsequent to and there's going to be -- there's
25 nothing wrong with saying I don't know and I don't recall

1 that. There is something wrong with making an assertion
2 that's not tethered to facts and make it as if it is.

3 MR. STOLL: Your Honor, that is why we've been
4 very careful not to make any characterizations publicly or
5 even in the briefing about who said what.

6 THE COURT: And in response to my questions too,
7 that's very important.

8 MR. STOLL: That's fair enough, Your Honor, and
9 that's why I am being very clear that with respect to
10 Lieutenant Iverson, I am not prepared at this stage to say
11 that he specifically fingered Sophia as making any IEDs.

12 THE COURT: Okay.

13 MR. STOLL: But he did say that protesters were
14 making them in relation to Sophia's injury and Sheriff Paul
15 Laney has said that Sophia was involved in the making of
16 IEDs. He is the sheriff, I believe, of one of the counties
17 adjacent to Morton County that was participating in these
18 raids -- sorry, in the sort of protest issues.

19 But in addition, it's not -- her irreparable harm
20 comes from the injury to her reputation. It's not important
21 whether the government caused that injury to her reputation.
22 Even if her defamation suit would be against the media or
23 against some particular editorialist for asserting that she
24 was making bombs, that's still irreparable harm to her and
25 that still satisfies the elements here for you to take

1 jurisdiction in this case. I don't believe that Sophia has
2 to show that her irreparable harm is caused by the
3 government in order to establish that prong.

4 And with that, I will rest.

5 (The Court and court reporter confer)

6 THE COURT: Counsel, you may respond briefly.

7 MR. BAUNE: Thank you, Judge, and I do intend to
8 be brief.

9 But I would start by saying it's the
10 plaintiff's -- or the petitioner's obligation, her burden,
11 to meet the elements of equitable jurisdiction and one of
12 those is equitable harm.

13 All this discussion we're having about defamation
14 today, I don't believe the word "defamation" appears in the
15 petition or in any of the briefing. It's not set forth, as
16 far as I can tell, anywhere.

17 And there's no clear discussion anywhere of what
18 her harm would be, what case she needs to bring in two
19 years, why she needs to bring something in two years. I
20 think she had to plead that at some point prior to today,
21 and even today I think she's got problems with it to the
22 extent she tries to address it.

23 With respect to the issue of reputational damages,
24 I think the *4801 Fyler* case is quite clear and I think it
25 covers this. Another case that also addresses it in even

1 greater detail, which is cited in our reply memorandum, is
2 the *United States v. Search of Law Office, Residence, and*
3 *Storage Unit of Alan Brown.* That's 341 F.3d 404. That
4 involved a search and seizure of records from a law office
5 and there was a reputational harm analysis there which was
6 declined by the court along similar lines, but expanded to
7 those that the Eighth Circuit said in *4801 Fyler*.

8 Also, I don't believe that medical bills are pled,
9 as far as I can tell, in any detail. I think this is just
10 brought up today and I think, again, that's too late if
11 that's the basis for jurisdiction.

12 As far as the ownership issue, I will say that at
13 one point I did argue that she would need to address
14 ownership with the hospital before it was removed, but I
15 believe that upon -- in response to prodding from the Court,
16 I amended that to at some point she would have to work that
17 out with the hospital, not necessarily before the surgery.

18 And lastly I want to address just a couple of
19 cases that were cited by the petitioner. The first is the
20 case out of the Virgin Islands in which property went back
21 to the last possessor. That was the jewelry. I would point
22 out that in that case it was a post-trial Rule 41(g) motion,
23 so it was not invoking equitable jurisdiction. It was a
24 year after sentencing and this property was being held and
25 there was no particular investigation. The government just

1 wanted to keep it forever without forfeiting the property.
2 As someone who has done a fair bit of forfeiture, I can tell
3 you that's not allowed and it's no surprise that that was
4 rejected. But that was not a pre-complaint or
5 pre-indictment type of situation and it went back to the
6 last possessor.

7 The *Ramsden* case was addressed. That's out of the
8 Ninth Circuit. And although the court found there was no
9 irreparable harm but still found jurisdiction, that case
10 was -- did involve a callous disregard of the petitioner's
11 Fourth Amendment rights. The government had a warrant of
12 arrest and they used that as a -- the petitioner came out
13 into the hallway and rather than arrest him there, the
14 government searched his entire -- or searched significant
15 portions of his hotel room and seized business documents.
16 The government was required to give him copies or else to
17 make copies and give him the original. I forget which one.
18 But, again, I think that's very different than here where
19 the evidence itself, the shrapnel itself and any residues on
20 it, are so central. And in this case there's no similar
21 callous disregard of the Fourth Amendment asserted.

22 That's all I have, Your Honor.

23 THE COURT: Okay. Thank you, Counsel. The matter
24 is submitted. Thank you, Counsel, for your arguments and
25 your knowledge of the record and careful presentation to the

1 Court of the facts as they have been established at this
2 stage in the case. Thank you.

3 | (Court adjourned at 11:55 a.m.)

* * *

I, Lori A. Simpson, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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Certified by: s/ Lori A. Simpson

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